BERJAYA TIMES SQUARE SDN BHD A

v.

YAP SING LEE & ANOR

COURT OF APPEAL, PUTRAJAYA B
TENGKU BAHARUDIN SHAH JCA
KN SEGARA JCA
SULONG MATJERAIE JCA
[CIVIL APPEAL NO: W-02-851-09]
7 JANUARY 2010 C

CONTRACT: *Sale and purchase of property - Sale and purchase agreement - Delay in completion - Claim by plaintiffs for liquidated damages - Termination of agreement by defendant - Whether wrongful - Whether plaintiffs had right to specific performance - Whether liquidated damages immediately payable to plaintiffs by virtue of cl. 22(2) of agreement* D

The plaintiffs purchased from the defendant, a property developer, a certain commercial premises *via* a sale and purchase agreement dated 9 September 1995 ('SPA'). The completion date under the SPA was 9 September 1998 and the extended completion date was 9 December 1998. The defendant only completed the project in June 2003 and was ready to deliver vacant possession of the premises on 1 July 2003. The plaintiffs were of the view that the defendant became liable to pay liquidated damages ('LAD') immediately to them from 9 December 1998 under cl. 22(2) of the SPA, and claimed against the defendant accordingly. The defendant, however, terminated the SPA and forfeited the sum of RM341, 248 paid by the plaintiffs towards the purchase price of RM853,120, notwithstanding that it was not ready to deliver the premises or vacant possession thereof to the plaintiffs. The plaintiffs sought, *inter alia*, specific performance of the SPA and LAD against the defendant. The High Court granted the plaintiffs' application, resulting in the present appeal by the defendant. E F G H

Held (dismissing the appeal with costs)
Per KN Segara JCA delivering the judgment of the court:

(1) The plaintiffs, on the facts, had certainly extended their cooperation to assist the defendant in completing the project before seeking any form of legal redress. They only filed their claim in 2007 – after the defendant had completed the project I

– to challenge the defendant's termination of the SPA. It was downright insincere and ungrateful of the defendant to purportedly terminate the SPA and forfeit the sum of RM341,248. The plaintiffs did not repudiate the SPA even when there was a fundamental breach in not delivering possession of the premises on the completion (or extended completion) date. They did not ask for a refund of the money they had paid towards the purchase price even after the expiry of the extended completion date and even though there was uncertainty as to when the project would be completed. In such circumstances, it would be unjust to deprive the plaintiffs of their right to specific performance of the SPA by the defendant upon completion of the premises, provided they make full payment of the balance purchase price and settle all the defendant's outstanding claims, after set-off of the total LAD due on the date of delivery of possession of the premises to them. The trial judge was correct in holding that the termination of the SPA by the defendant was wrongful. The defendant was in no position to deliver the premises when the purported notice of termination was issued to the plaintiffs. (paras 19-21)

(2) The LAD was due and payable to the plaintiffs under cl. 22(2) of the SPA and the word "immediately" incorporated therein, considering the particular factual matrix of this case, must be given its plain and ordinary meaning. (para 23)

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Plaintif-plaintif membeli dari defendan, satu pemaju perumahan, suatu premis komersial tertentu melalui perjanjian jual beli bertarikh 9 September 1995 ('PJB'). Tarikh penamatan di bawah PJB adalah 9 September 1998 dan tarikh penamatan lanjutan adalah 9 Disember 1998. Defendan hanya menamatkan projek tersebut pada Jun 2003 dan bersedia menyerahkan milikan kosong premis pada 1 Julai 2003. Plaintif-plaintif berpendapat bahawa defendan bertanggungjawab membayar gantirugi yang ditentukan ('GD') dengan segera kepada mereka dari 9 Disember di bawah kl. 22(2) PJB, dan seterusnya menuntut terhadap defendan. Defendan, walau bagaimanapun, menamatkan PJB dan merampas jumlah RM341,248 yang dibayar oleh plaintif-plaintif terhadap harga belian RM853,120, meskipun ia tidak bersedia menyerahkan premis atau

milikan kosong premis kepada plaintif-plaintif. Plaintif-plaintif menuntut, antara lain, pelaksanaan spesifik PJB dan GD terhadap defendan. Mahkamah Tinggi membenarkan permohonan plaintif-plaintif, mengakibatkan rayuan semasa oleh defendan.

Diputuskan (menolak rayuan dengan kos)
Oleh KN Segara HMR menyampaikan penghakiman mahkamah:

(1) Plaintif-plaintif, berdasarkan fakta, telah memang memberi kerjasama mereka untuk menolong defendan menamatkan projek sebelum menuntut apa-apa bentuk gantirugi undang-undang. Mereka hanya memfailkan tuntutan mereka pada 2007 – selepas defendan telah menamatkan projek - untuk mencabar penamatan PJB oleh defendan. Defendan bertindak dengan sungguh tidak ikhlas dan tidak berterima kasih bila ia menamatkan PJB dan merampas jumlah RM341,248. Plaintif-plaintif tidak membatalkan PJB walaupun terdapat kemungkiran asasi dalam menyerahkan milikan premis pada tarikh penamatan (atau penamatan lanjutan). Mereka tidak meminta wang yang dibayar oleh mereka terhadap harga belian dipulangkan meskipun tarikh penamatan lanjutan luput dan meskipun terdapat ketidakpastian bila projek tersebut dapat ditamatkan. Dalam keadaan sedemikian, ia tidak adil untuk menafikan hak plaintif-plaintif untuk mendapat pelaksanaan spesifik PJB oleh defendan selepas premis ditamatkan, setelah mereka membuat bayaran penuh baki harga belian dan menyelesaikan semua tuntutan defendan yang masih belum selesai, selepas menolak keseluruhan GD yang perlu dibayar pada tarikh penyerahan milikan premis kepada mereka. Hakim bicara betul bila memutuskan bahawa penamatan PJB oleh defendan adalah salah. Defendan tidak berupaya menyerahkan premis bila notis penamatan telah dikeluarkan kepada plaintif-plaintif.

(2) GD yang perlu dibayar kepada plaintif-plaintif di bawah kl. 22(2) PJB dan perkataan "dengan segera" yang dikandungi dalamnya, mempertimbangkan matriks fakta tertentu kes ini, mesti diberikan makna mudah dan biasanya.

[Diperintah sedemikian.]

A *For the appellant - B Thangaraj; M/s Thangaraj & Assoc*
For the respondent - GH Tee; M/s GH Tee & Co

[Appeal from High Court, Kuala Lumpur; Originating Summons No: S3-24-226-2007]

B *Reported by Suresh Nathan*

JUDGMENT

C **KN Segara JCA:**

[1] The respondents (plaintiffs) sought various alternative reliefs against the appellant (defendant) in the originating summons (OS) dated 25 January 2007 at the High Court. The reliefs sought against the defendant were, *inter alia*, specific performance, relief against forfeiture and liquidated damages (LAD).

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[2] The learned trial judge granted to the plaintiffs the following reliefs:

E a) specific performance of the Sale and Purchase Agreement dated 9 September 1995 between the plaintiffs and the defendant as per the Minutes of Judgment;

b) the defendant to pay liquidated and ascertained damages
F calculated from 9 December 1998 till delivery of vacant possession of the premise at the formula of RM853,120 x 0.12 x D/365 where D is the duration of the delay in days from 9 December 1998 to the date of delivery of vacant possession;

G c) interest at 8% per annum on the judgment sum from the date of the judgment till date of full realization; and

d) the costs of action.

H **[3]** The defendant appeals against the judgment/order dated 11 May 2009 granting the above reliefs to the plaintiffs.

[4] Briefly, the facts are as follows:

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[5] The defendant is a property developer. The plaintiffs (purchasers) and the defendant entered into a Sale and Purchase Agreement dated 9 September 1995 (SPA) to purchase a commercial premise known as Parcel No 07-53 (the premise) measuring 640 sq ft within the complex known as Berjaya Star City (the complex). The complex was a massive venture (project) involving the construction and development of a shopping, recreational, entertainment and commercial complex together with condotels/service suites. The purchase price for the premise under the SPA is RM853,120.

[6] The completion date under the SPA is 9 September 1998 and the extended completion date is 9 December 1998.

[7] Part-payments towards the purchase price made by the plaintiffs and their end financier totalled RM341,248, as follows:

(1) Invoice dated 6 July 1995 – RM85,312 (upon signing of SPA);

(2) Invoice dated 6 December 1995 – RM85,312 (supported by commencement certificate certifying commencement of Earthworks);

(3) Invoice dated 29 March 1996 – RM85,312 (supported by commencement certificate certifying commencement of Foundation Works); and

(4) Invoice dated 21 January 1997 – RM85,312 (supported by commencement certificate certifying commencement of Lowest Basement Carpark of the Complex).

[8] The progress in the defendant's project was extremely slow. The construction works on the complex was stopped, not proceeded with and/or suspended in the second half of 1997 and the first half of 1998. As at 10 July 1998, the reinforced concrete superstructure of the premise had not even commenced.

[9] It became obvious, by July 1998, from the actual physical construction works on site and all other surrounding circumstances of the project, that the defendant would not be able to complete the premise nor deliver vacant possession of the premise by 9 September 1998 (the completion date) or 9 December 1998 (the extended completion date). It appeared that the defendant was facing severe financial difficulties and there was no prospect of being able to complete the project timeously.

[10] In 1997 and 1998, the defendant was continuously facing economic crisis. Nevertheless, the defendant continued developing the said project at a slow pace. The defendant admitted that due to difficulties in cash flow, the defendant was forced to slow down the construction works on the said development project. The defendant admitted that the defendant completed the said project in June 2003 and was ready for delivery of vacant possession of the premise on 1 July 2003.

[11] Between October 1998 and June 1999 the defendant issued further invoices for the purchase price. The defendant also alleged that there was outstanding, since 27 August 1997, the sum of RM16,352.82, being outstanding interest on the progress payments of RM341,248 already paid by the plaintiffs.

[12] The plaintiffs were of the view that, as the defendant was not ready to deliver the premise or vacant possession thereof, the defendant became liable to pay liquidated damages (LAD) immediately to the plaintiffs from 9 December 1998 under cl. 22(2) of the SPA which reads:

> If the Developer fails to hand over vacant possession of the premises within the Extended Period, The Developer shall pay **immediately** to the Purchaser liquidated damages to be calculated **from day to day** at the rate of 12 per centum (12%) per annum of the Purchase Price from the date of the expiry of the Extended Period **up to the day of delivery of vacant possession** of the Premises. (emphasis added)

[13] The plaintiffs, therefore, maintained that the defendant pays the plaintiffs LAD immediately and/or the invoices to be paid by the plaintiffs be set-off against the LAD due to the plaintiffs.

[14] By a letter dated 6 March 2002 the defendant terminated the SPA and forfeited the sum of RM341,248 paid by the plaintiffs towards the purchase price of RM853,120, notwithstanding the fact that the defendant was not ready to deliver the premise or vacant possession thereof to the plaintiffs.

[15] The validity of the termination of the SPA was challenged by the plaintiffs, primarily on two grounds. Firstly, it was argued that the plaintiffs were equitably entitled to LAD under cl. 22(2) of the SPA and, consequentially, to a set-off against any alleged

sums of money due to the defendant. Secondly, it was alleged that the purported notice of termination did not comply with cl. 5 of SPA in that:

(a) the contents of the purported notice dated 6 March 2002 did not comply with cl. 5(3) of SPA (see pp. 263 and 213 Jilid 2A record of appeal);

(b) the notice dated 6 March 2002 cross-referred to an earlier letter dated 30 January 2002 which also failed to comply with cl. 5(3) (see pp. 261, 262 and 213 Jilid 2A record of appeal);

(c) the notice dated 6 March 2002 referred to letter dated 30 January 2002 which demanded a higher amount than a subsequent letter dated 22 February 2002 (see pp. 260 and 261 Jilid 2A record of appeal);

(d) the letter dated 30 January 2002 which was referred to in the notice of purported termination dated 6 March 2002, was superseded by the defendant's letter dated 22 February 2002 which did not threaten to terminate (see pp. 260 to 263 Jilid 2A record of appeal).

[16] The letter did not give the plaintiffs 14 days notice and there was no statement to warn the plaintiffs that the plaintiffs would be treated to have repudiated the contract if the plaintiffs do not pay within 14 days the amount alleged due and outstanding to the defendant.

[17] The plaintiffs had by letters, since 1999, asked the defendant the recognition of the right to set-off the LAD against the sums claimed by the defendant (see letters from pp. 251-259 Jilid 2A record of appeal).

[18] A letter dated 9 August 1999 issued by the defendant recognized the purchaser has the right to claim for LAD (see p. 374 Jilid 2B). The last paragraph of the letter reads:

> We are aware of your rights under the relevant terms of the sale and purchase agreement. However, we seek your cooperation to assist us in completing the project before you seek any form of redress on the late delivery of your property. We would value your positive response to our humble requests as it is vital for protecting your investments already made in Berjaya Star City.

[19] The plaintiffs have most certainly extended their co-operation to assist the defendant in completing the project before seeking any form of legal redress. The plaintiffs only filed their claim in 2007, after the defendant had completed the project, to challenge the termination of the SPA by the defendant. It was downright insincere and ungrateful of the defendant to purportedly terminate the SPA and forfeit the sum of RM341,248.

[20] The plaintiffs did not repudiate the SPA even when there was a fundamental breach in not delivering possession of the premises on the completion date or extended completion date. The plaintiffs did not repudiate the SPA and ask for a refund of RM341,248 they had paid towards the purchase price, even after the expiry of the extended completion date, and, even though there was uncertainty as to when the project would be completed. In such circumstances, it would be unjust to deprive the plaintiffs of their right to specific performance of the SPA by the defendant upon the completion of the premise, provided the plaintiffs make full payment of the balance purchase price and settle all outstanding claims by the defendant, after set-off of the total LAD due on the date of delivery of possession of the premise to the plaintiffs.

[21] We are unanimous that the trial judge was correct in holding that the termination of the SPA by the defendant was wrongful. The defendant was in no position to deliver the premises when the purported notice of termination was issued to the plaintiffs.

[22] In any event, we hold that it would be inequitable, unjust and unconscionable for the defendant to assert that the plaintiffs were in default of payments under the SPA, whilst the defendant adamantly refused to quantify and allow set-off of the LAD due to the plaintiffs pursuant to cl. 22(2) SPA, at the time of the issue of the purported notice of default/termination. Further, we hold the purported notice of termination was irregular and invalid as it did not comply with cl. 5(3) SPA.

[23] We agree with the trial judge that the SPA was wrongly terminated. We are unanimous that the LAD was due and payable to the plaintiffs under cl. 22(2) and the word "immediately" found therein must be given its plain and ordinary meaning. In the particular factual matrix of this case, and upon considering

carefully the manner in which cl. 22(2) has been drafted, and, the word "immediately" incorporated therein, we are unanimous, that so long as the SPA subsists, there is no room for an interpretation that the plaintiffs are only entitled to LAD after they are given possession of the premise. The facts of the present case (appeal) before us can be easily distinguished from the cases cited by counsel for the defendant. In any event, they are not binding on us.

[24] In the upshot, the appeal is dismissed with costs fixed at RM10,000 to the respondents (plaintiffs) and the deposit refunded.

[25] In ordering specific performance of the SPA, dated 9 September 1995, the trial judge failed to address the balance of purchase price payable by the plaintiffs. In the circumstances, the judgment/order of the High Court, dated 11 May 2009, must be rectified and varied as follows:

[26] In the judgment/order under provision "(1)", the following words is to be inserted: Tertakluk kepada plaintif-plaintif membayar kepada defendan baki harga jualan berserta faedah yang ditetapkan dalam tempoh 30 hari dari tarikh perintah ini (7 Januari 2010)" immediately before the word "Pelaksanaan", and deleting the words "dari tarikh penghakiman" in para (a), (b), (c) and (d) of provision "(1)".

[27] Provision "(2)" of the judgment/order is affirmed. A new provision "(3)" is to be added after provision "(2)" to read as follows:

> (3) Sekiranya Pelaksanaan Spesifik tidak dapat dilaksanakan diperintahkan gantirugi ditaksirkan oleh Pendaftar Mahkamah Tinggi dan dibayar oleh Defendan kepada Plaintif-plaintif.